BOARD OF APPEALS CASE NO. 072	*	BEFORE THE
APPLICANT: CALDICOT PROPERTIES LLC	*	ZONING HEARING EXAMINER
REQUEST: Rezone 66.45 acres from the AG classification to the GI classification; 315 E. Jarrettsville Road, Forest Hill	*	OF HARFORD COUNTY
	*	Hearing Advertised
	*	Aegis: 8/14/96 & 8/21/96
HEARING DATE: September 16, 1996		Record: 8/16/96 & 8/23/96
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ZONING HEARING EXAMINER'S DECISION

The Applicant, Caldicot Properties LLC, is requesting that certain property be rezoned from AG to GI, in part, and R3, in part.

The subject parcel is located at 315 E. Jarrettsville Road, Forest Hill, and is more particularly identified on Tax Map 40, Grid 1F, Parcel 53. The property is presently zoned AG Agricultural, consists of 66.45 acres, more or less, and is located entirely within the Third Election District.

STATEMENT OF THE FACTS

The first witness to testify on behalf of the Applicant was Kevin Geraghty, a member of the Applicant. Mr. Geraghty explained that the Applicant is the contract purchaser of the subject property. The Applicant's contract is contingent upon the subject property being rezoned as requested. The subject property is owned by Forest Hill Farm, Incorporated, a Maryland corporation ("Forest Hill").

Mr. Geraghty explained that the Applicant is requesting that the subject property be rezoned from its AG zoning classification to the R3 and GI zoning classifications. Using a site plan prepared by Morris & Ritchie Associates, Inc., ("MRA") he described the proposed development. He explained that, in his opinion, there is no viable market for multifamily dwellings which are permitted in the R3 district. As a result, single family detached units are proposed for the portion of the property to be rezoned R3. He testified that no concept plan for the portion of the property to be rezoned GI has yet been developed.

He went on to say that the subject property is unsuited for agricultural uses. He pointed out that only a small portion of it can be cultivated. The rest of the subject property consists of a small horse race track, barns and outbuildings which are in a dilapidated condition. Its relatively small size, extensive wetlands and a stream valley on site, plus the location of the horse racing track, effectively prevent farming operations from being conducted.

He testified that he and Kevin McBride of MRA had met with representatives of the Greater Bel Air/Forest Hill Community Planning Council to discuss the Applicant's request. He said the Council expressed no opposition to his request, only concerns about the type of residential development to be constructed on the portion of the property to be rezoned R3.

Mr. Geraghty also stated that due to the contingencies in his contract of sale, he could not wait until the comprehensive rezoning process is completed to request the rezoning. He said that a mistake was made in zoning the subject property AG during the last comprehensive rezoning completed in 1989 (the "1989 Comprehensive") which should be corrected now. Mr. Geraghty stated that he does not believe rezoning the subject property R3 and GI will cause any harm of any kind to anyone.

The next witness to testify on behalf of the Applicant was William Schmidbauer, the President of Forest Hill, the owner of the subject property. He stated that Forest Hill purchased the subject property in October, 1989, from the previous owners, Mr. and Mrs. Sauers, for the specific purpose of residential development. He indicated that the subject property was not developed for several years in order to avoid paying agricultural transfer taxes due on the sale. Once the subject property had been held for the requisite period of time, Forest Hill actively marketed it for sale. Mr. Schmidbauer confirmed that Forest Hill's contract of sale with the Applicant is contingent upon the subject property being rezoned from AG to R3 and GI. He also confirmed that the subject property is not well suited for uses allowed in the AG zone. He said that the only use to which the subject property can be put is a horse farm which does not generate sufficient income. Only a small portion of the subject property can be farmed which is leased to a farmer and currently planted in corn. He testified that the subject property is properly zoned residential and industrial.

Mr. Schmidbauer concluded his testimony by stating that because the existing AG zoning of the subject property is so unsuitable, if the requested rezoning is denied, Forest Hill will request that the subject property be rezoned during the next comprehensive rezoning.

Next to testify on behalf of the Applicant was Kevin McBride of MRA, who was accepted as an expert landscape architect. He indicated that MRA had performed the engineering and site plan work for the property. Mr. McBride testified that the subject property had site constraints which affect the owner's ability to develop it for uses permitted in the AG district. He pointed out areas of non-tidal wetlands which cover approximately 30% of the subject property and a stream valley which prevent agricultural activities from being conducted. He said that wetlands on the site were not delineated until very recently, after the 1989 Comprehensive was completed.

Mr. McBride said that the concept plan of the proposed development in the event the requested rezoning is granted indicated that 120 single family detached dwellings are planned for the portion of the property to be zoned R3. He explained that the actual number of units may change based on site constraints. Screening between the residential and industrially zoned areas is proposed as shown on the site plan. Although no specific layout of the portion of the property to be zoned GI has been prepared, he stated that this portion of the property could accommodate approximately 125,000 square feet of industrial space. Mr. McBride pointed out that if the entire parcel were zoned GI, approximately 500,000 square feet of industrial space could be built.

Mr. McBride explained that changes in the sewer service to the subject property had occurred since the 1989 Comprehensive was completed. He indicated that during the 1989 Comprehensive, public water service was available to the subject property, but public sewer service was not available. He said that since that time, the subject property has been placed in the service category for sewer in the Master Water and Sewer Plan. He indicated that the County Council could not have been aware of this change when the subject property was zoned AG during the 1989 Comprehensive Rezoning.

Mr. McBride went on to say that there would be adverse impacts on water quality caused by runoff from AG uses conducted on the subject property. He stated that adverse effects from residential and industrial development would be kept in check by the required grading permits, sediment control plans and storm water management plans.

The final witness to testify on behalf of the Applicant was Lee Cunningham, who was accepted by the Hearing Examiner as an expert land use and traffic planner. Mr. Cunningham testified that he had been retained by the Applicant to analyze its requested rezoning. In connection with his analysis, he reviewed the application, the staff report, the tax maps, the Harford County Zoning Code (the "Code"), the 1988 Land Use Plan, the 1996 Land Use Plan, the zoning maps, as well as all of the Applicant's exhibits. He testified that the subject property was not the subject of a change request or review during the 1989 Comprehensive.

Mr. Cunningham indicated that the subject property is classified on the 1988 Master Land Use Plan ("1988 Plan") as "Industrial/Commercial" and "High Intensity" and is located within the development envelope. The current 1996 Master Land Use Plan ("1996 Plan") classifies the subject property as "High Intensity" which permits R3, R4, B3, CI and GI zoning and is also located within the development envelope. He testified that zoning the subject property AG was not consistent with either the 1988 Plan or the 1996 Plan. Mr. Cunningham said that the current zoning maps show that the subject property is the only large, undeveloped AG zoned parcel in the area and is surrounded by GI and R3 zoning. He noted that there are very few large, undeveloped parcels zoned AG within the development envelope.

Mr. Cunningham went on to say that the Harford County Council ("Council") had a policy during the 1989 Comprehensive that properties be rezoned in a manner consistent with the 1988 Plan. He explained that the AG zoning of the subject property was inconsistent with that policy. Mr. Cunningham testified that the purpose of the Code is to support the Master Land Use Plan and that zoning the property AG clearly did not do so.

Mr. Cunningham confirmed that the subject property is not well suited for AG uses and that retaining its AG zoning would create adverse impacts on the surrounding residential and industrial areas. He also testified that rezoning the subject property R3 and GI is appropriate because doing so would be a logical extension of the zoning found on surrounding properties.

Mr. Cunningham also pointed out that the subject property's current AG zoning allowed special exceptions which could have adverse impacts on adjoining residential properties.

Mr. Cunningham stated it was his opinion that a mistake was made in the legal sense in the 1989 Comprehensive by the Council in retaining the AG zoning for the subject property and that rezoning the subject property R3 and GI would be a correction of that mistake. The evidence showed that the Council could not have known during the last comprehensive rezoning that sewer would be extended to the property or that wetlands comprised 30% of the property.

Mr. Cunningham acknowledged that the Council and the Department of Planning and Zoning (the "Department") abided by the wishes of the Sauers', the former property owners, in zoning the subject property AG during the 1989 Comprehensive. He said from a practical and political standpoint, doing so was appropriate and that neither the Department nor the Council should be criticized for doing so. However, he said it was a mistake in the legal sense to do so. Mr. Cunningham explained that he is unaware of any authority for the proposition that zoning property consistent with the wishes of the property owner had any effect whatsoever on whether a mistake in the legal sense was made. He noted that in Zoning Reclassification Case No. 063, B.L.C. Properties, Applicant, ("BLC") the Hearing Examiner ruled that the applicant's request to zone property GI during the previous comprehensive rezoning was not relevant in deciding whether a mistake was made in the legal sense in doing so. He also pointed out that the Department and the Council obviously thought that the Sauers' would continue to own the subject property when they asked that the AG zoning be retained. Mr. Cunningham said that the evidence in the staff report showed that the Council zoned the subject property AG at the specific request of Sauers'. He pointed out there is no other logical or rational reason for retaining the AG zoning on the subject property. He noted that the Council did not and could not have known that after the 1989 Comprehensive was finished, the Sauers' would sell the subject property to a new owner who purchased it specifically for development inconsistent with its AG zoning. He pointed out that the Council was thus mistaken in assuming or anticipating that the subject property would not be sold or, if sold, would be purchased by one who desired AG zoning.

Mr. Cunningham said that, as a result, the Council's initial premise as to the future use and ownership of the subject property was incorrect. This, he explained, constitutes a mistake in the legal sense.

Mr. Cunningham stated that he agreed with the staff report that the Applicant's rezoning request could be addressed during the next comprehensive rezoning. However, he testified that in his opinion, there was no reason to do so as this was a mistake which could be appropriately corrected now.

Mr. Cunningham also testified that rezoning the subject property R3 and GI would bear substantial relationship to the public health, safety and general welfare. He pointed out that the request was a natural extension of adjoining R3 and GI zones. He noted that the stream valley on the subject property which will act as the dividing line between the R3 and GI zones was a natural and appropriate demarcation line. He also said that the requested rezoning is compatible with the zoning of adjoining properties and both the 1988 Plan and the 1996 Plan. He explained that development of the subject property with uses permitted in the GI and R3 zones could prevent agricultural uses from being conducted which could have adverse impacts on the adjoining properties and would prevent expansion of the nearby airport. Mr. Cunningham also pointed out that other zoning classifications which would permit more intense development on the site and more adverse impact on adjoining properties than that requested by the Applicant, such as B3, R4 Urban Residential and CI Commercial Industrial, were also consistent with the 1996 Plan and could be considered during the comprehensive zoning.

Mr. Cunningham also explained that he had been retained to perform a traffic impact analysis last year for the Hickory Overlook development to determine traffic impacts caused by that project pursuant to Harford County's adequate public facilities ("APF") legislation.

Mr. Cunningham said that the analysis focused on intersections at Conowingo Road and Jarrettsville Road, Henderson Road and the Bel Air By-Pass. He noted that the analysis included all approved development in the area as determined by the Department. He pointed out that at that time, by changing traffic signal timing and making minor road improvements, a level of service "C" could be maintained at the intersection of Conowingo Road and Jarrettsville Road. Although, he said he did not perform a formal traffic analysis in connection with the instant case, based on standard Institute of Traffic Engineers trip generation rates for 120 single family dwellings and industrial development which could be accommodated on the subject property, he felt that traffic concerns regarding the proposed development could be addressed. He emphasized that traffic issues would be addressed in detail at the time of subdivision approval pursuant to the APF regulations if the subject property were rezoned. He stated that at that time a traffic study would be prepared at the direction of the Department. He noted that if APF traffic requirements cannot be met, no development will be allowed on the subject property.

Next, Anthony S. McClune, Chief of Current Planning of the Department testified. He stated that the Department disagreed with Applicant's argument that a mistake was made during the 1989 Comprehensive in zoning the subject property AG since the then property owner's wishes were honored in retaining that zoning classification. He said that the Department was of the opinion that these types of rezoning requests were more properly addressed during comprehensive rezoning and not in a piecemeal fashion.

Although many persons in attendance asked questions of the Applicant's witnesses, no one testified in opposition to the Applicant's request.

CONCLUSION

In Maryland, a parcel of land cannot be rezoned simply because the property owner wants the property rezoned or even if the zoning authority feels the property should be rezoned. Before any property can be rezoned, there must be strong evidence of a mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive zoning.

These principles, and their corollaries, were summarized in the case of Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975). A fair summary of the change-mistake rule is as follows:

1. The zoning classification assigned to a parcel of land as part of the last comprehensive zoning is presumed to be correct.

2. A piecemeal zoning reclassification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.

3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning or there has been a change in the character of the neighborhood of the subject property since the last comprehensive zoning which justifies the piecemeal zoning reclassification.

4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.

5. However, once an applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970). The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning; the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A.2d 640 (1963).

As stated by the Court of Special Appeals, the presumption of the validity of comprehensive rezoning,

> ...is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Error or mistake may also be established by showing that the events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect...It is necessary not only to show the facts that existed at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome, and the question of error is not "fairly debatable". Boyce v. Sembly, supra; Rockville v. Stone, 271 Md. 655, 319 A.2d 536 (1974) (emphasis supplied).

Therefore, there is a two-pronged test. The first question is whether there has been a change in the character of the neighborhood or a mistake in the zoning which would permit the rezoning ("Can the property be rezoned?"). If there is no change in the character of the neighborhood and no mistake in the comprehensive zoning, the property cannot be rezoned under any circumstances.

The second question is whether or not the requested rezoning should be granted ("Should the property be rezoned?"). Once it has been shown that there was a change in the character of the neighborhood or a mistake in the comprehensive zoning which would support a rezoning to the requested classification, then the property should be rezoned unless there is evidence of some real and substantial harm to the public health, safety or welfare.

Case No. 072 - Caldicot Properties LLC

The facts are uncontradicted and undisputed. The subject property was zoned AG in 1982. The Sauers', the previous owners of the subject property requested industrial zoning which the Council rejected during the 1982 Comprehensive Rezoning. The 1988 Plan classified the subject property as "Industrial/ Commercial" and "High Intensity" and placed it in the development envelope where intense development is supposed to occur. The 1989 Comprehensive then began. Aware of the Sauers' request in the 1982 Comprehensive Rezoning, Staff believed industrial zoning to be appropriate for the subject property. The Sauers' were contacted and requested to accept industrial zoning for the subject property during the 1989 Comprehensive Rezoning.

However, the Sauers' told the Staff they want to retain the AG zoning for their property. Staff so informed, the Council and the Council honored the Sauers' request.

It appears that the only reason the property was zoned AG in 1989 was because the present owners requested AG zoning.

There is no legal authority for the proposition that simply because an owner requests a specific zoning classification and the Council honors such a request, no mistake, in a legal sense, has been made. Neither does the corollary argument that failure to zone a property in a manner consistent with an owner's request would constitute a mistake. In the opinion of the Hearing Examiner, the fact that an owner requests or fails to request the rezoning of a parcel during a comprehensive review process is irrelevant to the question of mistake.

The Hearing Examiner also finds that a mistake was made during the 1989 Comprehensive Rezoning process. First, AG zoning on this parcel is inconsistent with the 1988 plan in that the parcel is designated "industrial/commercial" and "high intensity". It is noted that the present request is consistent with those designations. Secondly, no examination of the property was conducted during 1989, thus, the Council could not have been aware that the property consisted of 30% undevelopable wetland areas. Third, the sewer plan was not yet completely during 1989, thus the Council was unaware at that time that water and sewer service would be available to this property at the present time. Each of these factors constitute facts or trends which the Council could not have known in 1989 which impact, at the present time, any decision regarding the rezoning of the property.

Case No. 072 - Caldicot Properties LLC

The Applicant proposes development of single-family homes on the requested R3 portion of the property. Additionally, a small GI portion is planned, but it is not known specifically what use will be made of that parcel at this time. These uses are compatible with the surrounding and adjacent uses which presently consist of residential and industrial uses. Although not necessarily relevant to the finding of mistake, the Hearing Examiner concludes that residential development of this parcel would have far fewer adverse impacts to the adjacent residential community than many uses permitted as a matter of right in the AG District.

The Hearing Examiner, therefore, concludes that a "mistake" in the legal sense occurred in 1989 when the Council rezoned this parcel AG at the request of the owner. Additionally, it appears from all of the facts presented that the current request is consistent with the Master Land Use Plan, compatible with surrounding uses, and will generate no adverse impacts on public facilities or traffic.

The Hearing Examiner recommends that the request to rezone this property R3 and GI, consistent with the Applicant's request, be approved.

Date Dec 18, 1996

William F. Casey

William F. Casey
Zoning Hearing Examiner